

H.R. 1106, the “Helping Families Save Their Homes Act of 2009”

Section-by-Section Explanation

Section 1. Short Title; Table of Contents. Subsection (a) sets forth the short title of this Act as the “Helping Families Save Their Homes Act of 2009.” Subsection (b) consists of the table of contents.

Title I – Prevention of Mortgage Foreclosures

Subtitle A – Modification of Residential Mortgages

Section 101. Eligibility for Relief. Bankruptcy Code section 109(e) sets forth secured and unsecured debt limits to establish a debtor’s eligibility for relief under chapter 13. Section 101 of the Act amends this provision to provide that the computation of debts does not include the secured or unsecured portions of debts secured by the debtor’s principal residence, under certain circumstances. The exception applies if the value of the debtor’s principal residence as of the date of the order for relief under chapter 13 is less than the applicable maximum amount of the secured debt limit specified in section 109(e). Alternatively, the exception applies if the debtor’s principal residence was sold in foreclosure or the debtor surrendered such residence to the creditor and the value of such residence as of the date of the order for relief under chapter 13 is less than the secured debt limit specified in section 109(e).

In addition, section 101 amends Bankruptcy Code section 109(h) to waive the mandatory requirement that a debtor receive credit counseling prior to filing for bankruptcy relief, under certain circumstances. The waiver applies in a chapter 13 case where the debtor submits to the court a certification that the debtor has received notice that the holder of a claim secured by the debtor’s principal residence may commence (or has commenced) a foreclosure proceeding against such residence.

Section 102. Prohibiting Claims Arising from Violations of the Truth in Lending Act. Under the Truth in Lending Act, a mortgagor has a right of rescission with respect to a mortgage secured by his or her residence, under certain circumstances.¹ Bankruptcy Code section 502(b) enumerates various claims of creditors that are not entitled to payment in a bankruptcy case, subject to certain exceptions. Section 102 amends Bankruptcy Code section 502(b) to provide that a claim for a loan secured by a security interest in the debtor’s principal residence is not entitled to payment in a bankruptcy case to the extent that such claim is subject to a remedy for rescission under the Truth in Lending Act, notwithstanding the prior entry of a foreclosure judgment. In addition, section 102 specifies that nothing in this provision may be construed to modify, impair, or supersede any other right of the debtor.

¹15 U.S.C. § 1635 (2008).

Section 103. Authority to Modify Certain Mortgages. Under Bankruptcy Code section 1322(b)(2), a chapter 13 plan may not modify the terms of a mortgage secured solely by real property that is the debtor's principal residence. Section 103 amends Bankruptcy Code section 1322(b) to create a limited exception to this prohibition. The exception only applies to a mortgage that: (1) originated before the effective date of this provision; and (2) is the subject of a notice that a foreclosure may be (or has been) commenced with respect to such mortgage.

In addition, the debtor must certify pursuant to new section 1322(h) that he or she attempted – not less than 15 days before filing for bankruptcy relief – to contact the mortgagee (or the entity collecting payments on behalf of such mortgagee) regarding modification of the mortgage. This requirement does not apply if the foreclosure sale is scheduled to occur within 30 days of the date on which the debtor files for bankruptcy relief. If the chapter 13 case is pending at the time new section 1322(h) becomes effective, then the debtor must certify that he or she attempted to contact the mortgagee (or the entity collecting payments on behalf of such mortgagee) regarding modification of the mortgage before either: (1) filing a plan under Bankruptcy Code section 1321 that contains a modification pursuant to new section 1322(b)(11); or (2) modifying a plan under Bankruptcy Code section 1323 or section 1329 to contain a modification pursuant to new section 1322(b)(11).

Under new section 1322(b)(11), the debtor may propose a plan modifying the rights of the mortgagee (and the rights of the holder of any claim secured by a subordinate security interest in such residence) in several respects. It is important to note that the intent of new section 1322(b)(11) is permissive. Accordingly, a chapter 13 may propose a plan that simply proposes any or all types of modification authorized under section 1322(b)(11).

First, the plan may provide for payment of the amount of the allowed secured claim as determined under section 506(a)(1). In making such determination, the court, pursuant to new section 1322(i), must use the fair market value of the property as of when the value is determined.

Second, the plan may prohibit, reduce, or delay any adjustable interest rate applicable on and after the date of the filing of the plan.

Third, it may extend the repayment period of the mortgage for a period that is not longer than the longer of 40 years (reduced by the period for which the mortgage has been outstanding) or the remaining term of the mortgage beginning on the date of the order for relief under chapter 13.

Fourth, the plan may provide for the payment of interest at a fixed annual rate equal to the currently applicable average prime offer rate as of the date of the order for relief under chapter 13, as determined pursuant to certain specified criteria. The rate must correspond to the repayment term determined under new section 1322(b)(11)(C)(i) as published by the Federal Financial Institutions Examination Council in its table entitled, "Average Prime Offer Rates – Fixed." In addition, the rate must include a reasonable premium for risk.

Fifth, the plan, pursuant to new section 1322(b)(11)(D), may provide for payments of such modified mortgage directly to the holder of the claim or, at the discretion of the court, through the chapter 13 trustee during the term of the plan. The reference in new section 1322(b)(11)(D) to “holder of the claim” is intended to include a servicer of such mortgage for such holder. It is anticipated that the court, in exercising its discretion with respect to allowing the debtor to make payments directly to the mortgagee or by requiring payments to be made through the chapter 13 trustee, will take into consideration the debtor’s ability to pay the trustee’s fees on payments disbursed through the trustee.

New section 1322(g) provides that a claim may be reduced under new section 1322(b)(11)(A) only on the condition that the debtor agrees to pay the mortgagee a stated portion of the net proceeds of sale should the home be sold before the completion of all payments under the chapter 13 plan or before the debtor receives a discharge under section 1328(b). The debtor must pay these proceeds to the mortgagee within 15 days of when the debtor receives the net sales proceeds. If the residence is sold in the first year following the effective date of the chapter 13 plan, the mortgagee is to receive 80 percent of the difference between the sales price and the amount of the claim as originally determined under section 1322(b)(11) (plus costs of sale and improvements), but not to exceed the unpaid amount of the allowed secured claim determined as if such claim had not been reduced under new section 1322(b)(11)(A). If the residence is sold in the second year following the effective date of the chapter 13 plan, then the applicable percentage is 60 percent. If the residence is sold in the third year following the effective date of the chapter 13 plan, then the applicable percentage is 40 percent. If the residence is sold in the fourth year following the effective date of the chapter 13 plan, then the applicable percentage is 20 percent. It is the intent of this provision that if the unsecured portion of the mortgagee’s claim is partially paid under this provision it should be reconsidered under 502(j) and reduced accordingly.

Section 104. Combating Excessive Fees. Section 104 amends Bankruptcy Code section 1322(c) to provide that the debtor, the debtor’s property, and property of the bankruptcy estate are not liable for a fee, cost, or charge that is incurred while the chapter 13 case is pending and that arises from a claim for debt secured by the debtor’s principal residence, unless the holder of the claim complies with certain requirements. It is the intent of this provision that its reference to a fee, cost, or charge includes an increase in any applicable rate of interest for such claim. It also applies to a change in escrow account payments.

To ensure such fee, cost, or charge is allowed, the claimant must comply with certain requirements. First, the claimant must file with the court and serve on the chapter 13 trustee, the debtor, and the debtor’s attorney an annual notice of such fee, cost, or charge (or on a more frequent basis as the court determines) before the earlier of one year of when such fee, cost, or charge was incurred or 60 days before the case is closed.

Second, the fee, cost, or charge must be lawful under applicable nonbankruptcy law, reasonable, and provided for in the applicable security agreement.

Third, the value of the debtor’s principal residence must be greater than the amount of

such claim, including such fee, cost or charge.

If the holder fails to give the required notice, such failure is deemed to be a waiver of any claim for such fees, costs, or charges for all purposes. Any attempt to collect such fees, costs, or charges constitutes a violation of the Bankruptcy Code's discharge injunction under section 524(a)(2) and the automatic stay under section 362(a), whichever is applicable.

Section 104 further provides that a chapter 13 plan may waive any prepayment penalty on a claim secured by the debtor's principal residence.

Section 105. Confirmation of Plan. Bankruptcy Code section 1325 sets forth the criteria for confirmation of a chapter 13 plan. Section 105 amends section 1325(a)(5) (which specifies the mandatory treatment that an allowed secured claim provided for under the plan must receive) to provide an exception for a claim modified under new section 1322(b)(11). In addition, section 105 specifies certain protections for a creditor whose rights are modified under new section 1322(b)(11). As a condition of confirmation, new section 1325(a)(10) requires a plan to provide that the creditor must retain its lien until the later of when: (1) the holder's allowed secured claim (as modified) is paid; (2) the debtor completes all payments under the chapter 13 plan; or (3) if applicable, the debtor receives a discharge under section 1328(b).

Section 105 also provides that as a condition of confirming a chapter 13 plan that modifies a claim pursuant to new section 1322(b)(11), the court must make two findings. First, the court must find that the modification is in good faith. Second, the court must find that the debtor has not been convicted of obtaining by actual fraud the extension, renewal, or refinancing of credit that gives rise to such modified claim.

Section 106. Discharge. Bankruptcy Code section 1328 sets forth the requirements by which a chapter 13 debtor may obtain a discharge and the scope of such discharge. Section 106 amends section 1328(a) to clarify that the unpaid portion of an allowed secured claim modified under new section 1322(b)(11) is not discharged. This provision is not intended to create a claim for a deficiency where such a claim would not otherwise exist.

Section 107. Standing Trustee Fees. Section 108(a) amends 28 U.S.C. § 586(e)(1)(B)(i) to provide that a chapter 13 trustee may receive a commission set by the Attorney General of no more than four percent on payments made under a chapter 13 plan and disbursed by the chapter 13 trustee to a creditor whose claim was modified under Bankruptcy Code section 1322(b)(11), unless the bankruptcy court waives such fees based on a determination that the debtor has income less than 150 percent of the official poverty line applicable to the size of the debtor's family and payment of such fees would render the debtor's plan infeasible.

With respect to districts not under the United States trustee system, section 108(b) makes a conforming revision to section 302(d)(3) of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986.

Section 108. Effective Date; Application of Amendments. Section 108(a) provides that

this measure and the amendments made by it, except as provided in subsection (b), take effect on the Act's date of enactment.

Section 108(b)(1) provides, except as provided in paragraph (2), that the amendments made by this measure apply to cases commenced under title 11 of the United States Code before, on, or after the Act's date of enactment.

Section 108(b)(2) specifies that paragraph (1) does not apply with respect to cases closed under the Bankruptcy Code as of the date of the enactment of this Act.

Subtitle B – Related Mortgage Modification Provisions

Section 121. Adjustments as a Result of Modification in Bankruptcy of Housing Loans Guaranteed by the Department of Veterans Affairs. Subsection (a) amends 38 U.S.C. § 3732 to provide that in the event a housing loan guaranteed under that provision is modified pursuant to Bankruptcy Code section 1322(b), the Secretary of Veterans Affairs may pay the holder of the obligation the unpaid balance of the obligation due as of the date of the filing of the bankruptcy case, plus accrued interest, but only upon the assignment, transfer, and delivery to the Secretary of all rights, claims, evidence, and records with respect to such loan.

Subsection (b) amends 38 U.S.C. § 3703(d) to clarify that the maximum maturity of thirty years and thirty-two days on housing loans guaranteed by the VA applies only to loans at the time of origination and not to those loans that are subsequently modified.

Section 122. Payment of FHA Mortgage Insurance Benefits. Subsection (a) provides Federal Housing Administration (FHA) claims authority to pay servicers for reductions in principal or interest rate ordered by a bankruptcy court, giving flexibility to do so either as a full assignment of the claim, a partial claim of the reduced principal, or a periodic or one-time payment of reduced interest. This subsection also gives FHA authority, independent of any such bankruptcy order, to facilitate FHA loan modifications through new authority for the assignment of a mortgage for the purpose of such modification, with subsequent options to re-insure the loan and either re-assign the mortgage to the existing servicer, re-pool the loan, or re-sell the mortgage in according with any federal program established to purchase such loans.

Subsection (b) expands FHA partial claim authority (also independent of any bankruptcy order), which is currently limited to 12 months of interest, to permit such claims in amounts up to 30% of the outstanding principal balance. The purpose is to facilitate greater flexibility for FHA to carry out loan modifications.

Subsection (c) permits HUD to implement these provisions through notice or mortgagee letter.

Section 123. Adjustments as Result of Modification of Rural Single Family Housing Loans in Bankruptcy. Subsections (a) and (b) provide clarification that the Rural Housing Service (RHS) may pay claims on direct RHS mortgage loans and the guaranteed portion of guaranteed RHS mortgage loans related to reductions in principal or interest ordered by a

bankruptcy court.

Subsection (c) permits RHS to implement these provisions through notice, procedure notice, or administrative notice.

Section 124. Unenforceability of Certain Provision as Being Contrary to Public Policy. This provision distinguishes between provisions in existing investment contracts that require pro rata sharing of certain bankruptcy losses, depending on whether the provision refers to types of losses that could not have been incurred prior to enactment of this bill, or to types of losses that could have been incurred, clarifying that the latter, but not the former, are enforceable.